# Quarterly Report

OF THE

# ATTORNEY GENERAL

OF

# ALABAMA

FOR THE PERIOD

FROM APRIL 1, 1971

THROUGH JUNE 30, 1971

VOLUME 143

WILLIAM J. BAXLEY, Attorney General

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# QUARTERLY REPORT

of the

# ATTORNEY GENERAL

of

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For the Period

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Through June 30, 1971

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TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS OF ALABAMA:

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from April 1, 1971, through June 30, 1971, is published in compliance with the provisions of Title 55, Section 228, Code of Alabama 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State, and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

WILLIAM J. BAXLEY

Attorney General

WILLIAM J. BAXLEY
Attorney General

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Deputy Attorney General

E. RAY ACTON
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# OPINIONS

April 7, 1971

Honorable Claude D. Kelley
Director of Conservation
Administrative Building
Montgomery, Alabama 36104

State and State Departments—Conservation Department—Docks Department—State Lands—Leases.

While the Docks Department has authority to negotiate sale of submerged lands, the Conservation Department has jurisdiction to manage same.

Opinion by Assistant Attorney General Macrory.

Dear Mr. Kelley:

On March 17, 1971, you submitted a request for an official opinion to Attorney General William J. Baxley, which is as follows:

> "What department or agency of the State has authority and jurisdiction for purposes of negotiation and sale of any area of submerged land in Mobile Bay situated immediately adjacent to the old Brookley Field complex and east of the Garrows Bend Channel, all in Mobile County, Alabama. The submerged land lies shoreward of the pierhead and bulkhead lines (harbor lines) established by authorities of the United States."

In 1951, Assistant Attorney General Straub wrote an official opinion published in Quarterly Report of Attorney General, Volume 65, page 16, based on the interrelation between the following Acts:

Act No. 341, General Acts 1945, page 554, approved July 9, 1945 (Title 8, Sections 253-265, Code of Alabama 1940);

Act No. 635, General Acts 1927, page 725, approved September 6, 1927 (Title 8, Section 219, Code of Alabama 1940);

Act No. 162, General Acts 1939, page 255, approved March 14, 1939 (Title 8, Section 2, Code of Alabama 1940); and

Act No. 534, General Acts 1947, page 389, approved October 13, 1947 (Title 38, Section 18(1), Code of Alabama 1940).

This opinion dealt with the manner in which funds realized from a certain oil and gas lease covering lands owned by the State of Alabama lying under tidal waters were to be distributed.

The conclusion reached by Mr. Straub was based mainly on Act No. 534, supra, which provides that the power and authority to sell "any submerged lands and made lands claimed or owned by the State which lands are under or were formerly under any of the tidal waters of the State of Alabama, or which abut such tidal waters" is vested in the Director of the Department of the State Docks and Terminals. Act No. 534, supra, restricts its applicability "only to such

lands which lie **shoreward** of harbor lines established by the authorities of the United States and of the State of Alabama having jurisdiction over such matters." (Emphasis supplied.) Act No. 534, supra, further provides that "All departments and agencies of the State, other than the Department of State Docks and Terminals, are relieved of any duties, responsibilities, and powers with reference to the lands [to] which this act applies . . .".

However, Act No. 162, supra (Title 8, Section 1, Code of Alabama 1940), creates the Department of Conservation and establishes its purpose to be "to enable the governor to exercise a direct and effective control over the **natural resources** . . . and in order to bring together in one department . . . all matters pertaining to **natural resources** . . . of the state." (Emphasis supplied)

In 1955, the State Legislature passed Act No. 367, Acts of Alabama 1955, page 887, approved September 7, 1955 (Title 38, Section 1(18), Code of Alabama 1940, Recompiled 1958), which provides that "The jurisdiction of the department (state docks and terminals) shall not be exclusive, however, and nothing contained herein shall be taken as a deprivation of the authority of the department of conservation to control, hold, lease, manage, or own the minerals, sand, gravel, or any other **natural resources** in the beds of navigable streams or other public waters as provided by law." (Emphasis supplied) This Act was followed in 1956 with Act No. 158, Acts of Alabama 1956 (First Special Session), page 224, approved February 24, 1956 (Title 26, Section 179(561), Code of Alabama 1940, Recompiled 1958), which provides that "The Director of Conservation, on behalf of the State, is hereby authorized to lease . . . any lands or any right or any interest therein under any navigable streams or navigable waters . . . and the shores along any navigable waters to high tide mark . . . for the exploration, development, and production of oil, gas, and other minerals, or any one or more of them, on, in, and under such lands; and such lands or interests therein for such purposes shall be supervised and managed by the Department of Conservation." The latter two acts clarify and reinforce the responsibility of the Department of Conservation, as set out in Act No. 162, supra, to control, manage and develop the natural resources located on, in, and under lands owned by the State lying beneath tidal waters, whether shoreward or seaward of harbor lines established by the United States and State of Alabama authorities.

**Premises** considered, the Department of State Docks and Terminals has the authority and jurisdiction to negotiate and sell the **land** in question.

Yours very truly,

WILLIAM J. BAXLEY
Attorney General

April 19, 1971

Honorable Daniel A. Dennis, Jr., Secretary
Alabama State Board of Pharmacy
1300 Arlington Street
Mobile, Alabama 36605

State and State Departments—Pharmacists—Expenses.

In State and out of State Board of Pharmacy expenses.

Opinion by Assistant Attorney General Tyson.

Dear Mr. Dennis:

Your recent request for an official opinion of this office is as follows:

> "As Attorney for the Board of Pharmacy, please advise me in writing on the following questions:
>
> "1. May the President of the Board of Pharmacy assign inspection duties to the Board Members during a time when the Board is not in session and may the Members be reimbursed at $25.00 per day for attending to these duties for the Board?
>
> "2. May the members of the Board of Pharmacy be reimbursed $25.00 per day while attending annual meetings of the National Association of Boards of Pharmacy and other pharmaceutical conventions out of the State of Alabama since, during this time, functions of the Board are discussed?"

Question one, by its nature, raises several points which will be answered as follows:

With reference to the power of the President of the Board of Pharmacy to assign inspection duties to the members of the Board during a time while the Board is not in session, your attention is called to Title 46, Section 257 (a3) - (a5), Code of Alabama, Recompiled 1958. I find no authority for the President to assign such duties; and to the contrary, to do so would be in my opinion a violation of the Act inasmuch as the authority to make inspections and investigations is by law imposed upon the state drug inspectors employed by the Board under Section 257(a7) of Title 46, Code of Alabama, Recompiled 1958.

In dealing with reimbursement of Board members for their duties, your attention is called to the provisions of Title 46, Section 257 (a4), Code of Alabama, Recompiled 1958, which in pertinent parts reads as follows: ". . . The members of the board shall be paid twenty-five dollars ($25.00) per diem and all necessary expenses while engaged in the performance of the duties of the board. . . ." By reference thereto, this opinion does hereby adopt the opinion to the Board of Pharmacy of December 31, 1969, wherein this office specifically held that instead of receiving all "necessary expenses," such had been superseded by Act No. 470, Acts of Alabama Legislature 1969, which places

a fifteen dollar per day maximum upon all traveling expenses, this being true regardless of the fact that the Board of Pharmacy does not receive an awarded appropriation, but rather receives its funds from licenses, permits, and penalties assessed. See copy of said opinion as hereto attached and made Exhibit "A" to this opinion.

Since the aforesaid opinion, the members of the Board of Pharmacy, when attending regular or special meetings of the Board, have been entitled to receive the twenty five dollars per diem under Section 257 (a4), supra, and a maximum of fifteen dollars per day travel allowance, and ten cents per mile if using their personal automobiles. This holding is hereby reaffirmed.

It should be noted in passing that on travel for Board meetings requiring an overnight stay, the unit accounting which is required under Section 1 of Act No. 470 of the 1969 Session, supra, is not required. See opinion of the Attorney General, dated March 9, 1971, to the Honorable Roy Sanders, Comptroller, same being hereto attached and made a part hereof.

With reference to Question Two, it is the opinion of this office that the twenty five dollars per day may not be claimed by members of the State Board of Pharmacy for attendance at the annual meetings of the National Association of Boards of Pharmacy or for attending other regional meetings of the National Association or other pharmaceutical groups outside the State of Alabama, since such travel would be governed by Section 2 of Act No. 470, Acts of Alabama 1969, supra, which allows reimbursement of actual expenses. In brief, since the members of the Board of Pharmacy may receive reimbursement for actual expenses, then they may not in addition claim the twenty five dollars per day for attendance at such annual meetings as hereinabove described.

I trust this answers your inquiry.

Cordially yours,

WILLIAM J. BAXLEY
Attorney General

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May 3, 1971

Honorable John W. Pemberton
Clerk, House of Representatives
State Capitol
Montgomery, Alabama 36104

Officers and Offices — Legislature — Alabama Legislative Council.

Office of legislative agents terminated and opinion of November 12, 1970, withdrawn.

Opinion by Deputy Attorney General Beck.

Dear Mr. Pemberton:

The opinion of the Attorney General to you dated November 12, 1970, concerning the term of office of legislative agents is hereby withdrawn. The following opinion is rendered instead.

The office of legislative agent was created by Act No. 19, Acts of Alabama 1965, and amended by Act No. 437, Acts of Alabama 1966.

Although said Act as amended provides for legislative agents to represent counties when neither the representative nor the senator elected from a legislative district is a qualified elector and resident of the county, said Act does not provide a specific term of office. These agents are elected by the House of Representatives. It is the opinion of the Attorney General that the legislature intended for the term of the agent to expire at the end of the four-year term for which the legislator was elected.

Therefore, it is the opinion of the Attorney General that no legislative agents exist until new ones are elected by the House of Representatives. Accordingly, you are not authorized to pay anyone representing himself as an agent until the new ones are elected.

Yours very truly,

WILLIAM J. BAXLEY
Attorney General

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May 4, 1971

Hon. O. H. Florence
Judge of Probate
Jefferson County Courthouse
Birmingham, Alabama

Taxation—Filing Tax—Judges of Probate—Mortgages.

Where maturity date on mortgage is not changed, then no mortgage tax is due on balance of mortgage assumed.

Opinion by Assistant Attorney General Loeb.

Dear Judge Florence:

Reference is made to your letter of March 25, 1971, in which you request the opinion of this office as to whether a refund of mortgage privilege tax is due to be made by your office relative to recordation therein of a mortgage agreement, copy of which was attached to your request for opinion.

The facts, in brief, as appearing from your letter and the attachments are as follows: Mortgagor, D. H. Overmyer Co., Inc. became

indebted to mortgagee, U. S. Communications Corporation in the amount of $236,700.00, as evidenced by a mortgage dated April 29, 1967, and filed for record in your office together with payment of mortgage tax on such indebtedness. The instrument now under consideration represents an additional advancement of $163,300.00, by mortgagee to mortgagor, and is collateralized by all of the same property and rights in property which secured the original mortgage between the same parties. The date of maturity for payment of the aggregate indebtedness of $400,000.00 remains the same as in the original mortgage.

The recitals contained in the instrument here in question show that while the primary purpose is to secure an additional indebtedness of $163,300.00, the parties do not intend to replace the original mortgage. In fact, it is stated that the original mortgage is being amended and supplemented in such a way that the terms and conditions of the original mortgage are still to be strictly observed and performed and are incorporated by reference in the amending instrument so as to be valid and effective upon the parties thereto.

From the facts set out above, it appears that the instrument here under consideration is being filed to secure an additional indebtedness of $163,300.00, and is therefore subject to mortgage privilege tax as measured by this new indebtedness upon which no tax has been paid. It further appears that said instrument does not fall within the purview of Section 619(f), as amended, Title 51, Code of Alabama, Recompiled 1958, inasmuch as it does not extend the time of maturity but, to the contrary, explicitly states that the provisions of the original mortgage as to payment, performance, conditions, etc., are to remain in full force and effect.

It is my conclusion, therefore, that there is no tax due on whatever balance remains unpaid at the present time under the original mortgage. This conclusion is in line with, and analogous to, an informal opinion of this office to Honorable J. Paul Meeks, dated December 29, 1970, and opinions in Quarterly Reports of the Attorney General, Vol. 23, p. 214 and Vol. 116, p. 20.

This opinion is to be distinguished from the opinion reported in Quarterly Report of the Attorney General, Volume 119, page 19, as pointed out in your request, in that this opinion dealt with a fact situation where the date of maturity in the second mortgage agreement was changed and was different from that set out in the original mortgage. Under these circumstances, it was there held that the provisions of Title 51, Section 619(f), supra, were applicable and that the tax was due not only on the new or additional indebtedness but also on the indebtedness so extended or renewed.

Since the mortgagee or his attorney, as the case may be, has already paid the sum of $600.00 to your office for recordation of this

instrument, it would now be proper, in line with the conclusions reached above, for you to refund to said mortgagee the sum of $355.05.

Yours very truly,

WILLIAM J. BAXLEY
Attorney General

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May 4, 1971

Honorable C. G. Middlebrooks
Tax Collector, Wilcox County
Camden, Alabama

Taxation—Assessments—Tax Assessor—Wilcox County.

Tax assessment is made only for property located in County.

Opinion by Assistant Attorney General Payne.

Dear Sir:

Your letter dated April 30, 1971, requesting opinion of this office reads as follows:

> "Please give me an official opinion as to the law relating to the following set of facts:
>
> "We have a closed corporation on our books owned primarily by one man, and the corporation has no assets other than the original issuance of stock, and, of course, the stock is worthless. He owes us considerable money, but he refuses to pay his taxes and he also will not dissolve the corporation.
>
> "Now this same individual owns and assesses 27 acres of land upon which is situated a residence valued at $50,000.00 or more. He pays the tax promptly on this property.
>
> "Is there some way that I can advertise and sell this property individually owned to pay his corporation tax? Can I advertise the corporation stock for sale and include this land due to the fact that it belongs to one of the principal stockholders?
>
> "Time is short and I will thank you for an opinion at an early date as to what relief I may have in this situation."

We discussed somewhat over the telephone yesterday the situation pertaining to your request. You advised me that the name of the corporation involved was T. C. Weatherly Co., Inc., Pine Hill, Alabama, with the home office listed as 706 Alabama Avenue, Selma, Alabama. I obtained from the Ad Valorem Tax Division of the Department of Revenue the file on the corporation.

The record shows that the 1970 TAX RETURN LIST was returned to the Tax Assessor of Wilcox County by the corporation and signed by

Bess C. Weatherly, its secretary. The return was sworn to by the secretary before the Tax Assessor of Wilcox County on the 15th day of January, 1970. The return does not list any real estate. There is listed personal property described as "Construction Equip." valued at $10,000. You tell me that the assessment amounts to some $200. I assume that there is a valid assessment in the sum of some $200 assessed against the corporation as ad valorem tax on its construction equipment. From the record, it appears that if you are to make the tax, it will have to be made from the construction equipment. As I see it, your problem is in locating the equipment. Presumably, when the equipment was listed with the Tax Assessor of Wilcox County, it was located in said county; if it was located elsewhere, it could not have been legally or validly assessed in Wilcox County.

If the assessment against the property in question was proper, the levy on same can be made no matter where it is located in the State of Alabama. The assessment held by you, properly certified, can be forwarded to the Tax Collector in the county in which the property may be located and the levy made in the usual course by that Collector; he in turn would, of course, remit to you the amount of the tax collected.

Under the record as I see it, you have no authority to sell property belonging to the individual to whom you refer in your letter, as you have no assessment (as I understand it) against the individual. You have the authority to ascertain from the person signing the TAX RETURN LIST for 1970 where the particular property is located and whether or not it was located in Wilcox County at the time it was listed for assessment. As stated earlier, it is presumed that it was so located or it could not have been assessed in the first place.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

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May 5, 1971

Honorable R. S. Limbaugh
Mayor
City of Childersburg
Childersburg, Alabama 35044

Municipalities — ABC Board — License.

Only ABC Board may revoke license issued by Board.

Opinion by Assistant Attorney General McQueen.

Dear Mayor Limbaugh:

I have your letter of recent date in relation to the Alcoholic Beverage Control Board Club License issued to VFW Post 8604. You state in your request that you have been advised by Mr. Suttles that

once a club liquor license is issued, it may only be revoked by the ABC Board. Mr. Suttles advised you correctly in this regard.

The Supreme Court in the case of **Ott vs. Moody,** 215 So. 2d 177, held that the Legislature had granted exclusive authority to the ABC Board for the purpose of suspending or revoking licenses issued by it. In this case the Supreme Court considered an ordinance adopted by the City of Dothan similar to the ordinance which you have in Childersburg. The Court held that this ordinance was unconstitutional in that it was inconsistent with the laws of the State, and a municipal corporation has no authority to adopt an ordinance inconsistent with a State law.

I, therefore, advise you that the only agency that has the authority to revoke the license here considered is the Alabama Alcoholic Beverage Control Board.

Yours very truly,

WILLIAM J. BAXLEY
Attorney General

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May 7, 1971

Honorable William H. Griffin
City Recorder
City of Huntsville
Municipal Building
Huntsville, Alabama

Municipalities—Courts—Costs and Fees.

Proof required different under city ordinance and state law on drunkenness, also state does not reimburse court costs on indigents.

Opinion by Assistant Attorney General Gish.

Dear Mr. Griffin:

Reference is made to your request of April 6, 1971, for an opinion of this office, which reads as follows:

> "I am the City Recorder for the city of Huntsville, Alabama. I have recently been apprised of the above cited act of the legislature under which additional court costs are set out for offenses under city ordinances which would be a misdemeanor under the State Code. I have also been shown a copy of an opinion rendered by your office holding that these additional costs should be imposed if the above qualifications are met. I am deeply concerned over the practical application of these court costs and would greatly appreciate a considerably more elaborate opinion covering certain questions which come to

mind. I am particularly concerned with that specific portion of Act No. 999 dealing with the addition of $5.00 court costs on city offenses which constitute state misdemeanors.

"I have compared the wording of various city ordinances to that of the State Code covering the same offenses. Even to the casual observer, there is a considerable variation in the degree and kind of proof required between the two sets of laws. As an example of this, Huntsville's public drunkenness ordinance, in effect, makes it an offense for a person to appear in a public place in a drunken condition. As opposed to this, the State Code lists among its elements of public drunkenness, boisterousness and disorderly conduct. Obviously, the charge could be proven under Huntsville's ordinance but would many times fail under the state statute. Should court costs be collected on this charge? The above example is only one of many such variations. How are we to determine which charges we are to collect additional costs for?

"I am also concerned over the facts that a large percentage of the defendants in my court end up unable to pay the assessed fine. As a result of this, they serve out the fine and costs at the rate of $1.00 per day. Additional costs assessed against these defendants would result in their spending additional days in city jail, this being an expense to the city. Am I to assume that the State will reimburse the City of Huntsville for the expense of keeping prisoners who are unable to pay the additional court costs assessed by the state? If so, I would like to know the amount that the city could expect to be reimbursed for each day in jail served by a prisoner in lieu of payment of these additional costs.

"I regret that we have previously been unable to comply with this act, but I am sure you can see the confusion it presents. If you like, I will be glad to forward to you a copy of Huntsville's City Code so that you might indicate for us those offenses which you feel should be covered by the additional court costs."

The statute which establishes and controls the Alabama Peace Officers' Annuity and Benefit Fund is Act No. 999, Acts of Alabama 1969, page 1855. Section 9 of said statute provides for the court costs to which your request refers. The material portion of said Section 9 is quoted in the opinion of this office rendered to Honorable Walker Hobbie, Jr., Member, Alabama House of Representatives, under date of January 22, 1971. A copy of said opinion is enclosed.

We also enclose a copy of the opinion to Honorable John F. Watkins, Executive Director, Alabama League of Municipalities, dated March 16, 1971, in which we discuss some of the problems in regard to the assessment by City Recorders of the court costs imposed by said Section 9.

The enclosed opinion to Mr. Watkins answers your question in regard to the "public drunkenness" ordinance of the City of Huntsville. Based upon said opinion, you are advised that the statute, here considered, does not impose additional court costs under such ordinance. This is true because, under the facts presented, the proof required for conviction under said ordinance would fail to establish a misdemeanor under state law.

As pointed out in said opinion to Mr. Watkins, each question of the type hereinabove mentioned must be determined on its own facts. The final determination as to whether the additional court costs required by Act No. 999, supra, must be imposed is a judicial decision which must be left to the municipal recorder. We trust that the enclosed opinions will aid you in making such determinations in each case.

Your request also concerns the problem of sending a convicted person to city jail where he does not pay the fine and costs assessed.

Section 9, supra, bases the remittance of the costs prescribed thereby upon the payment of such costs. For this reason you are advised that where the convicted person does not pay the court costs in cash and thereby serves a jail sentence no remittance of the costs imposed by Act No. 999, supra, is required.

We find no statute which allows the State to reimburse the City of Huntsville for the expense of keeping prisoners who are unable to pay court costs. Therefore, you are advised that such reimbursement may not be made.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

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May 7, 1971

Mrs. Ruby C. Neeley
Clerk-Treasurer
City of Huntsville
Huntsville, Alabama

Municipalities—Archives & History Department—Records.

Requirements of law pertaining to microfilming and destroying records discussed.

Opinion by Assistant Attorney General Gish.

Dear Mrs. Neeley:

Reference is made to your request of March 26, 1971, for an opinion of this office, which reads as follows:

"Due to the expanding role of municipal governments in programs of services and improvements within the past few years, there has been a tremendous increase in the load of paperwork. The requirement for recording keeping has presented the problems of storage and preservation of the city's records.

"There are two laws providing for the disposal or destruction of public records. Title 55, Sections 289(6)—289(10), Code of Alabama 1958 (Recompiled) gives general authority for the disposal of obsolete public records with the consent of the Director of the Alabama State Department of Archives and History.

"In 1963 the Legislature enacted Act No. 549, Acts of Alabama 1963, page 1166, which is codified in Title 37, Sections 511(45)—511(60), Code of Alabama 1958 (Recompiled). This Act sets out the method by which municipal records may be destroyed and prescribes a minimum retention period for certain records.

"In 1955, the Legislature passed Act No. 565 relating to the management of public records of the State, or any political sibdivision thereof; providing for the photographing or microphotographing of public records and for the admissibility in evidence of photographed or micro-photographed copies of records required to be kept by public officers. This Act is codified in Title 55, Sections 18(6)—18(16), Code of Alabama 1958 (Recompiled).

"The City of Huntsville is interested in microfilming certain of its records which have semi-permanent significance and under Title 55, Sections 289(6)—289(10) and Title 37, Sections 511(45)—511(50), Code of Alabama 1958 (Recompiled), must be preserved until the reason for their retention has ceased to exist or have complied with the minimum time of retention.
"I ask for your opinion on the following points:

"1. Will microfilm copies of the records of the City of Huntsville constitute proper preservation of the records and comply with the retention requirement?

"2. After the microfilm copies have been processed and checked with the originals for accuracy, can the records be destroyed or disposed of?

"3. Will it be necessary for the City Council to appoint a records commission?

"4. After the records have been microfilmed, will it be necessary to follow the procedure set out in Title 37, Sections 511(45)—511(50). Code of Alabama 1958 (Recompiled), before these records can be disposed of?

"5. Will it be necessary to have the consent of the Director of the State Department of Archives and History?"

Your purpose will be better served if you have from me a general discussion of the applicable law rather than answers to your specific questions.

Your request indicates that you are familiar with the provisions of the statutes which concern the preservation and destruction of public records in this State. Each of these statutes provide for methods and procedures to be followed by custodians of public records and local governing bodies regarding the retention and destruction of the various types of public records. There are three such statutes, none of which repeal or modify the provisions of the others. See Quarterly Report of Attorney General, Volume 82, page 7.

Act No. 565, Acts of Alabama 1955, page 1226, as amended by Act. No. 425, Acts of Alabama 1967, page 1095, is now found in Title 55, Sections 18(6) through 18(16), Code of Alabama 1940, Recompiled 1958. This statute authorizes a municipality to microfilm its public records and use its funds to defray the cost thereof. While this statute provides methods by which state and county public records may be destroyed, there is no provision concerning the destruction of municipal records.

Act No. 293, General Acts of Alabama 1945, page 486, which is now codified as Title 55, Sections 289(6) through 289(10), Code of Alabama 1940, Recompiled 1958, provides for the destruction of public records upon the recommendation of the custodian thereof and with the consent of the Director of the Alabama State Department of Archives and History. A municipal governing body may, of course, seek the approval of the director of said department regarding the destruction of any municipal public records which have no significance, importance or value.

Act No. 549, Acts of Alabama 1963, page 1166, codified as Title 37, Sections 511(45) through 511(50), Code of Alabama 1940, Recompiled 1958, provides a method by which a municipal governing body may destroy certain public records of the municipality after minimum retention periods specifically prescribed by the statute.

Based upon the statutory provisions mentioned hereinabove, I am of the opinion that the City of Huntsville may microfilm its public records in accordance with the provisions of Act No. 565, as amended, supra. I am also of the opinion that said governing body may allow the destruction of certain of its public records only by following either the procedure prescribed by Act No. 293, supra, or Act No. 549, supra.

We trust that the opinion expressed herein will furnish the desired information. If you have further questions, please let us know.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

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May 10, 1971

Dr. Horace C. Clayton
Member
City Council
City of Pell City
211 19th Street, South
Pell City, Alabama 35125

Municipalities—Police & Fireman—St. Clair County.

Police and fire protection may be furnished beyond city limits.

Opinion by Assistant Attorney General Gish.

Dear Dr. Clayton:

Reference is made to your request of April 17, 1971, for an opinion of this office, which reads as follows:

> "I am writing on behalf of the entire City Council and Mayor of Pell City, Alabama. We are desirous of extending fire protection for people or businesses outside the police jurisdiction of Pell City. For example along Logan Martin Lake there are marinas, other businesses and numerous dwellings which do not have fire protection. The question involved is the legality of performing these services. For example if our fire truck became involved in an accident outside the police jurisdiction could an individual be held legally liable or could the governing body be involved in the same manner? We would appreciate your written advice and legal statement as to how and if we can provide this service and have legal immunity as with the services provided within the police jurisdiction and within the city limits."

Title 37, Section 450(1), Code of Alabama 1940, Recompiled 1958, authorizes a municipality to furnish fire protection beyond its corporate limits and police jurisdiction. This statute also provides that the municipality and firemen, when acting beyond the territorial jurisdiction of the city shall enjoy the same immunity from tort liability which is provided for acts performed within said territorial jurisdiction.

Therefore, I am of the opinion that the City of Pell City is authorized to furnish the fire protection contemplated by your request.

If your governing body desires further information after examining the statute cited herein, please let us know.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

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May 13, 1971

Honorable Arthur L. Hardegree
Attorney at Law
Post Office Box 67
Ashland, Alabama 36251

Municipalities—Bids—Property.

Municipality may sell real estate through negotiation.

Opinion by Assistant Attorney General Gish.

Dear Mr. Hardegree:

Reference is made to your request as Attorney for the Town of Lineville, dated April 21, 1971, which reads as follows:

> "The Mayor and Town Council of the Town of Lineville, Alabama, have requested that I obtain from you an opinion relative to the following:
>
> "The Town of Lineville acquired a parcel of real estate in 1968 which has been and is being used as a parking facility for the general public. A recently chartered state bank desires to purchase this property from the town for the stated purpose of erecting thereon a building in which to conduct its banking operations.
>
> "1. Does the town of Lineville have the authority to sell this property to a private banking corporation?
>
> "A. If so, would it be necessary for the Town Council to make a determination that subject property was no longer needed for municipal purposes?
>
> "B. If so, would such a sale be governed or controlled by the 'Competitive Bid Law,' or offered to the highest bidder; or, could such a sale be made on a negotiated basis with the prospective purchaser?
>
> "2. In the event, the above-mentioned property could be legally disposed of, and is disposed of, would the municipality then be authorized to acquire other property to provide parking facilities for the general public.

Act No. 843, Acts of Alabama 1953, page 1135, reads, in part, as follows:

> "The governing body of any city or town in this state may, by ordinance to be entered on its minutes, direct the disposal of any real property, not needed for public or municipal purposes, and direct the mayor to make title thereto; and a conveyance made by the mayor in accordance with such ordinance invests the grantee with the title of the municipality."

You will note from the above-quoted portion of said Act No. 843, that a municipality is authorized to sell real property owned by it only when such property is not needed for public or municipal purposes. For this reason, you are advised that the governing body of the Town of Lineville will be authorized to sell the real property to which you refer only after it has determined that the property is not needed by the Town.

You are also advised that there is no statute which requires said Town to sell its real property on a competitive bid basis. Therefore, the property to which you refer may be sold by the Town on a negotiated basis.

We advised in Quarterly Report of Attorney General, Volume 115, page 32, that a municipality is authorized to establish, maintain and operate off-street parking facilities within its corporate limits. Therefore, I am of the opinion that in the event the Town of Lineville sells the real property now owned by it other property may be acquired to provide offstreet parking facilities.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

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May 31, 1971

Alabama Public Service Commission
501 Dexter Avenue
Montgomery, Alabama

State & State Departments—Public Service Commission—Utilities—Legislature.

The Alabama Public Service Commission under New Acts putting Alabama on original cost basis, and allowing greater time for investigations, are applicable to all pending cases.

Opinion by Assistant Attorney General Madison.

Gentlemen:

On May 11, 1971, Acts Nos. 89 and 97, Special Session 1971 of the Alabama Legislature, became effective upon their approval on that date by the Governor.

Xerox copies of the Acts are attached to this opinion and made a part thereof as it fully set out in extenso at this point herein.

Act No. 69 granted authority to suspend the operation of any new schedule of rates or service regulations filed with the Alabama Public Service Commission for a period of not exceeding six months.

The above Act No. 89 amended Section 54, Title 48, Code of Alabama 1940, which before the amendment provided for a suspension period of not exceeding sixty days.

Act No. 97 amended Section 52, Title 48, Code of Alabama 1940, by providing in the Section the following:

> "For the purpose of fixing rates such reasonable value of a public utility's property shall be deemed to be the original cost thereof, less the accrued depreciation, as of the most recent date available and the amount of the new investment to be added in the year immediately following the test period used on arriving at the value of such utility's property."

The above Act No. 97 expressly stated that Title 48, Section 319 of the 1958 Recompiled Code of Alabama, and all laws and parts of laws in conflict are repealed to the extent of the conflict.

As here pertinent this eliminated from the Commission's consideration the cost of reproduction as a going concern for the purpose of fixing rates.

Alabama Gas Corporation filed new schedules of rates with the Alabama Public Service Commission (Docket No. 16382). The pending proceeding along with those of some other public utilities were pending but not decided by the Alabama Public Service Commission at the time Acts Nos. 89 and 97 became effective.

The question presented to me is whether the law as set forth in said Acts 89 and 97 is applicable to these pending proceedings.

My answer is in the affirmative.

It is a familiar principle of law that statutes are presumed to be valid and courts will indulge all presumptions and intentments in favor of their validity. **Opinion of the Justices,** 281 Ala. 50, 198 So. 2d 778.

In the rate making process, neither the Commission nor the courts have any liberty to ignore valid standards set up by the Legislature. **Alabama Public Service Commission v. Southern Bell Telephone and Telegraph Company.** 268 Ala. 312, 106 So. 2d 163.

It is my opinion that the law as declared by Acts Nos. 89 and 97 is applicable to the pending proceedings of Alabama Gas Corporation and other pending and undecided public utility cases seeking rate increases.

I deem the ruling in **United States v. Alabama,** 362 U.S. 602, 4 L. Ed. 2d 982, to be applicable here in principle and authority for following and applying the law as declared in said Acts 89 and 97 to the pending proceeding before the Commission.

The duty upon the Commission to approve rates and charges which are reasonable and just to both the utility and the public is expressly preserved and not impaired by the two Acts under consideration. The Legislature has determined that six months instead of sixty days is a reasonable period within which to enable the Commission to make investigations which the public interest requires before the new schedule of rates or schedule regulations become effective. In so providing, the Legislature considered the magnitude of such investigations and evidently considered sixty days to be inadequate. I can see no legitimate basis for any reasonable argument that such change to provide an adequate period of time for investigations in the public interest impairs the obligation of contracts or is otherwise beyond the power of the Legislature to so provide.

In sum, it is my opinion that both Act No. 89 and Act No. 97 are the result of the legitimate exercise of legislative authority and the Commission must, where pertinent, follow and apply their provisions to all pending petitions for rate increases before the Alabama Public Service Commission.

Cordially yours,

WILLIAM J. BAXLEY
Attorney General

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June 6, 1971

Honorable Bryan McAfee
Judge of Probate
Morgan County
Decatur, Alabama 35601

Judge of Probate—Courts—Insane Persons—Guardian & Ward.

Procedure on application for revocation of guardianship discussed.

Opinion by Assistant Attorney General Hall.

Dear Judge McAfee:

Reference is made to your letter of May 28, 1971, making certain inquiries with regard to the interpretation of Title 21, Section 18, and Title 30, Section 43, Code of Alabama 1940 (Recompiled 1958), dealing with applications for revocation of guardianship of persons of unsound mind and juries in such cases.

Title 21, Section 18, supra, provides, in part, that in the event of a contest of an application for revocation of guardianship, "like proceedings must be has as upon the original inquisition."

Title 21, Section 12 of the Code, provides that in inquisition proceedings the Judge of Probate shall summon six disinterested persons of the neighborhood to sit as a jury.

The Supreme Court in the case of **Pope v. Bolin,** 224 Ala. 322, 140 So. 382, held that as regards guardianship, proceedings to revoke the inquisition may be considered as part of and in the nature of a continuance of the original proceeding. See, also **Patterson v. Downs,** 255 Ala. 197, 50 So. 2d 408, at page 411.

Therefore, since the matter is specifically provided for in Title 21, Section 18, it is my opinion that Title 30, Section 43, has no application. In other words, only six jurors are required, and they are to be selected by the Judge from six disinterested persons of the neighborhood.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

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June 8, 1971

Mr. Thomas W. Carroll
Superintendent of Education
Covington County Schools
Education Building
Crescent Street
Andalusia, Alabama 36420

Schools—Jurors and Juries—Employment—Employers and Employees—County Boards of Education.

1. No part-time employee comes within the provisions of Act No. 619, Regular Session 1969, Page 1126 (Title 30, Section 7(1), Code of Alabama 1940, Recompiled 1958, as amended), whether he has other employment or not.

2. Neither a full-time employee nor a part-time employee is required to turn his jury fee or compensation over to his employer.

3. A school bus driver who is a part-time employee, is not entitled to be paid as such driver whether he is serving on a jury or is otherwise occupied at the time the school bus is required to be driven.

Opinion by Assistant Attorney General Hall.

Dear Mr. Carroll:

Your request for an official opinion bearing date of May, 21, 1971, is as follows:

> "The Covington County Board of Education employs approximately 45 adults as school bus drivers, a few of which are teachers. The others work for themselves or other agencies during the time they are not driving the buses.
>
> "Our bus lines vary in length and in the time it takes each driver to make his run in the morning and in the afternoon. The time required is from about 45 minutes to one and one-half hours for a single trip or one and one-half hours to three hours per day for the round trip. They are paid for this time by the Covington County Board of Education. We count this as part-time employment.
>
> "Some of our bus drivers are called from time to time to serve on juries. Depending on the situation they may be able to make the regular runs as bus drivers and to serve on the jury.
>
> "Act No. 619 of the Alabama State Legislature approved August 29, 1969 says, among other things . . . 'Notwithstanding the excused absence as herein provided, any full time employee shall be entitled to his usual compensation received from such employment less the fee or compensation he received for serving as juror.'
>
> "1. Is a school bus driver who works three hours or less per day driving a bus considered a full time employee under the provisions of Act 619? If he works any number of hours less than eight per day, is he a full time employee under the provisions of this Act?
>
> "2. Should a bus driver who is able to fulfill his daily duty as a bus driver and serve on the jury also be required to turn his jury fee or compensation over to the Covington County Board of Education?
>
> "3. Should a bus driver who does not drive while he is serving on the jury be paid by the Covington County Board of Education under a resolution for the regular day, and turn his jury compensation or fee over to the Covington County Board of Education?

"4. Should a bus driver who does not drive while serving on the jury be allowed to keep his jury fee and be cut a day's pay by the Board of Education?"

My answer to your several questions may be summarized as follows:

1. No part-time employee comes within the provisions of said Act, whether he has other employment or another occupation or not.

2. Neither a full-time employee nor a part-time employee is required to turn his jury fee or compensation over to his employer. The Act clearly specifies that in the case of a full-time employee being called for jury service, such employee shall be entitled to his usual compensation less the fee or compensation received for serving as such juror.

3. A school bus driver being a part-time employee, is not entitled to be paid as such driver whether he is serving on a jury or is otherwise occupied at the time the school bus was required to be driven.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

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June 9, 1971

Colonel Walter L. Allen
Director
Department of Public Safety
Montgomery, Alabama 36104

State and State Departments—Public Safety Department—Dead Bodies—Courts.

Law Officer may not take blood sample from dead body.

Opinion by Assistant Attorney General Hall.

Dear Colonel Allen:

Reference is made to your letter of June 2, 1971, requesting my opinion as to the liability of a mortician, embalmer or assistant for taking a blood sample from a decendent for the purpose of chemical analysis to determine the blood-alcohol level. You state in your letter that such sample is to be taken at the request of a State Trooper, Sheriff, Deputy Sheriff, Municipal Police Officer, Coroner, or other peace officers or law enforcement officer.

I find nothing in the Alabama Chemical Test for Intoxication Act (Title 36, Sections 154, et seq.) which authorizes any person to request a mortician, embalmer, or assistant to take a blood sample from a decendent.

Title 36, Section 155, Subsection 5(e), provides that only a physician, registered nurse or duly licensed clinical laboratory technologist or clinical laboratory technician may withdraw blood for the purpose of determining the alcoholic content therein.

Furthermore, Title 36, Section 154, permits blood to be withdrawn from a person's body only after he has been lawfully arrested for any offense arising out of acts alleged to have been committed while the person was driving a motor vehicle on the public highways of this State while under the influence of intoxicating liquor. Naturally, a dead person could not be placed under arrest. Therefore, in my opinion, Subsection (b) of Section 154 is meaningless.

Numerous cases have held that the next of kin of a decedent may bring an action for damages against any person who even slightly mutilates or damages the body of the decedent without the consent of such next of kin or without a proper order for an autopsy.

In the situation mentioned in your letter, the law enforcement officer requesting the sample may subject himself to liability along with the person taking the sample.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

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June 11, 1971

Col. Walter L. Allen
Director
Department of Public Safety
Montgomery, Alabama 36104

State and State Departmens—Public Safety Department—Courts—Licenses.

Legal effect of former jeopardy plea outlined.

Opinion by Assistant Attorney General Calhoun.

Dear Col. Allen:

We are in receipt of your letter in which you request the opinion of this office on the following two questions: (a) Is there a merger of the offenses of reckless driving, speeding, driving on the wrong side of the road, and other like traffic offenses, into the offense of driving while intoxicated? (b) Where one is charged in two separate cases with speeding, or a like offense, and driving while intoxicated, both offenses having arisen out of the same transaction, does a conviction of the offense of speeding in the first case cause former jeopardy to attach and operate as a bar to the subsequent prosecution of the driving while intoxicated charge?

My answer to your first question is in the negative. Under the common law doctrine of merger where a person by the same act commits two crimes, one a felony and the other a misdemeanor, the misdemanor is held to merge into the felony, and the accused is liable for only the felony. But it is universally held by the courts that the doctrine of merger has no application where both crimes are misdemeanors or both are felonies. 22 C.J.S. Criminal Law, section 10; 21 Am. Jur 2d, Criminal Law, section 9; Miller, **Criminal Law,** pages 50-51. Our research discloses no Alabama case wherein the merger doctrine has been applied where both crimes were misdemeanors or felonies. Accordingly, since both speeding and driving while intoxicated are misdemeanors in Alabama, speeding should not be held to merge into driving while intoxicated when both offenses arise out of the same act.

Your second question is likewise answered in the negative.

In the case of **Trawick v. City of Birmingham,** 23 Ala. App. 308, 125 So. 211, cert. denied, 220 Ala. 291, 125 So. 212, the Court of Appeals of Alabama answered your question in the affirmative by holding that a plea of former jeopardy under the same facts as presented by you operated as a bar to the second prosecution for driving while intoxicated.

Nevertheless, the same Court, the Court of Appeals of Alabama, in a more recent case, **Garner v. State,** 31 Ala. App. 52, 11 So.2d 872, when presented with the same question, held that a former jeopardy plea would not bar the second prosecution for driving while intoxicated after a conviction had been had in the first case. In arriving at its decision, the Court used the following test to determine the sufficiency of the former jeopardy plea; if the facts necessary to convict on the second prosecution would necessarily have convicted the accused on the first prosecution, a final judgment on the first prosecution will be a bar to the second; but if the facts which will convict on the second prosecution would not be sufficient to convict on the first, then the first will not be a bar to the second.

Our research discloses no decision by the Supreme Court of Alabama on this precise question.

Because **Garner v. State,** supra, is the most recent case on this precise issue in the appellate court system of Alabama and because the reasoning of the Court in the **Garner** case is in accord with that of the majority of the courts in our sister states (see 22 C.J.S. Criminal Law §§285, 295(2)), it is the opinion of this office that a plea of former jeopardy should not be held to operate as a bar to the subsequent prosecution for driving while intoxicated in the factual situation presented by your second question.

Yours very truly,

WILLIAM J. BAXLEY
Attorney General

June 16, 1971

Honorable Walter L. Allen
Director
Department of Public Safety
State of Alabama
Montgomery, Alabama

State and State Departments—Employee's Retirement System—Retirement Public Safety Department.

Retirement options under Retirement System discussed.

Opinion by Assistant Attorney General McQueen.

Dear Colonel Allen:

Your letter of recent date relative to benefits payable under Title 55, Section 456, Code of Alabama 1940, has been received by this office.

Payments of benefits under this section have been established by the Board of Control of the Employees' Retirement System and approved by this office. The method of such payments are as follows:

> "1. Pro rata part of a monthly benefit of a retired employee who dies under the maximum retirement allowance is paid to the Estate or a named beneficiary. Warrants issued for full month should be returned. No one else is authorized to cash them.
>
> "2. When Option I is chosen the balance of the present value of his annuity as it was at the time of retirement is paid to his legal representative or named beneficiary; in other words, the balance of his own accumulated contributions not paid out in benefits.
>
> "3. When Option II or III is chosen the reduced retirement allowances are payable to the named beneficiaries and from the first of the month in which death occurs.
>
> "4. Benefits to the chosen beneficiary of a retired member cease as of the first of the month in which death occurs to the chosen beneficiary."

If retirement warrants are issued after death occurs, the warrants should be returned for proper issuance in accordance with the various options chosen.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

June 16, 1971

Honorable L. R. Driggers
Mayor
City of Dothan
Dothan, Alabama 36301

Eminent domain—Municipalities—Funds—Contracts.

1. A municipality may by eminent domain acquire land upon which to construct municipal buildings.

2. The control of the finances of a municipality is vested in the governing body thereof.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion dated May 21, 1971, is as follows:

"The City of Dothan proposes to construct a Civic Center which will include a City Office Building, Auditorium and Convention Hall. One of the proposed locations of this project will require several parcels of contiguous real estate in the business section of the City; and, while part of the land may be acquired by purchase, it will require eminent domain proceedings to secure all of the land desired for this project.

"1. Please advise if a municipality may acquire land by a process of eminent domain for a Civic Center.

"2. Please advise if the City of Dothan may use public funds to purchase options from some of the owners of these separate tracts or parcels at a rate of approximately 5% of the purchase price and condition these options to be exercised at a later date after securing enough parcels either by purchase or eminent domain to accommodate the proposed project."

A municipality has the statutory authority to acquire by eminent domain land within its corporate limits upon which to construct municipal buildings. See Title 37, Section 507, Code of Alabama 1940.

Therefore, in answer to your first question, you are advised that the City of Dothan may acquire by eminent domain land upon which to construct the Civic Center to which your request refers.

The control of the finances of a municipality is exercised by the governing body thereof. Municipal funds must be used for a public purpose; however, the application of revenues not pledged to specific purposes is left to the discretion of such governing body. **Johnson v. City of Sheffield et al.**, 236 Ala. 411, 183 So. 265.

Therefore, in answer to your second question, I am of the opinion that the City of Dothan may, within the discretion of its governing body, purchase the options to which your request refers.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

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June 16, 1971

Honorable John F. Watkins
Executive Director
Alabama League of Municipalities
Post Office Box 1270
Montgomery, Alabama 36102

Municipalities—Newspapers and Newsstands—Notices —Publication—Zoning.

The publication of municipal zoning ordinances discussed generally.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion dated May 10, 1971, is as follows:

> "In behalf of the cities and towns of Alabama we respectfully request your opinion on a question which is consistently causing much concern relating to the validity of publication of municipal zoning ordinances.
>
> "Specifically we refer to the provisions found in Title 37, Section 773 and 778 of the 1969 Pocket Parts to the Code of Alabama. The provision in question reads as follows:
>
> " 'No ordinance shall be passed by any municipal corporation under the authority of this article unless and until the proposed ordinance has been published at least once a week for two consecutive weeks in advance of its passage in a newspaper of general circulation published within the municipality, or if there is no such newspaper, then by posting the same in four conspicuous places within the municipality, together with a notice stating time and place that the ordinance is to be considered by the municipal legislative authority, and stating further at such time and place all persons who desire shall have an opportunity of being heard in opposition to or in favor of such ordinance.'
>
> "The part of this provision which concerns us is that portion which provides 'general circulation published within the munici-

pality.' We have a number of small municipalities wherein there is no newspaper printed. At the same time in these municipalities there are generally a number of newspapers which are in general circulation therein.

"Please answer the following questions:

"1. What do the words 'published within the municipality' mean?

"2. If a newspaper of general circulation puts its issues of the newspaper into circulation within a municipality through a second class mailing permit within the municipality does this constitute publication?

"3. If a newspaper of general circulation within a municipality is put in circulation through its own trucks that make deliveries to newsboys within a municipality does this constitute publication within the municipality?

"In short we are most concerned about this because our smaller municipalities do not have the funds or means of paying for expensive publications of municipal zoning ordinances in newspapers of general circulation within their bounds. If they can be relieved of this very heavy expense where there is no newspaper printed within the municipality this would encourage more and better zoning ordinances for our growing smaller municipalities."

In order to qualify to carry legal advertisements and notices, a newspaper must meet each of the requirements prescribed by Title 7, Section 713, Code of Alabama 1940, as amended by Act No. 395, Acts of Alabama 1966, page 534. Quarterly Reports of Attorney General, Volume 53, page 66, and Volume 35, page 82. Among the requirements prescribed by Section 713, as amended, supra, a newspaper must have been mailed under the second class mailing privilege of the United States Post Office Department from the Post Office where it is published for fifty-two (52) consecutive weeks.

A newspaper is published at the place where it is entered in the Post Office and where it is first put into circulation. **Vick, et al. vs. Bishop,** 252 Ala. 250, 40 So. 2d 845. See also **Cobbs v. Patterson, et al.,** 275 Ala. 84, 152 So. 2d 151.

We have been informed that there are two types of second class mailing permits which may be secured by a newspaper. Those permits which authorize a newspaper to mail from the Post Office located in the municipality where the news material is gathered and prepared at the main office of the newspaper are designated as permits of original entry. Those permits which authorize a newspaper to mail from any other Post Office are designated as permits of additional entry. Considering the requirements stated above in connection with the provisions of the statutes to which you refer, I am of the opinion that a

newspaper is published only within the municipality where the main news office is located. The fact that a newspaper may also be mailed from another municipality does not constitute publication within the second municipality. Of course, the fact that a newspaper is delivered by truck from one municipality to another so that newsboys may make deliveries does not constitute publication within the second municipality.

Premises considered, you are advised that a newspaper which meets the requirements of Section 713, as amended, supra, is published only within that municipality where the main office of the newspaper is located and where the newspaper is mailed under a permit of original entry. If such a newspaper is located within the municipality, municipal zoning ordinances must be published therein in the manner prescribed by the statutes to which your request refers. In municipalities where no such newspaper is located, zoning ordinances may be posted in the manner prescribed by the statutes cited in your request and no newspaper publication is necessary.

We trust that the above discussion furnishes answers to each of the questions presented.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

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June 21, 1971

Honorable David W. Pruett
Chairman
Colbert County Commission
Tuscumbia, Alabama

Counties—Jails—Colbert County.

Prisoner's keep in city jail approved.

Opinion by Assistant Attorney General Clark.

Dear Mr. Pruett:

This will acknowledge your recent letter requesting an opinion as to whether the State of Alabama may remit to the county the usual portion of the prisoners' keep for each county prisoner where, as here, fire has destroyed the county jail and prisoners have been placed in different city jails. The county has continued to pay for the prisoners' keep.

This office has ruled that the municipality may require the county to pay for the keep of such prisoners. Quarterly Report of Attorney General, Volume 116, page 9.

Removal of prisoners on account of fire is authorized under Title 45, Section 128, Code of Alabama 1940.

In my opinion, where removal to a city jail is necessary because of a fire, the State may remit that portion of county prisoners' keep usually allowed when such prisoners are confined in a county jail, upon proper presentation of bills for the prisoners' keep.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

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June 21, 1971

Honorable Walter L. Allen
Director
State of Alabama
Department of Public Safety
Montgomery, Alabama

Cost and Fees—Public Safety Department—Licenses.

Public Safety Department may not revoke drivers license on nolo contendere plea.

Opinion by Assistant Attorney General Calhoun.

Dear Sir:

Reference is made to your request for an opinion of this office, dated May 26, 1971, in which you ask the following question: When an Alabama resident enters a plea of nolo contendere to a charge of driving while intoxicated in Georgia and suffers the imposition of a fine and costs in the case, must the Director of the Department of Public Safety suspend or revoke that person's Alabama driver's license and driving privileges pursuant to the provisions of Title 36, Section 68, Code of Alabama 1940, Recompiled 1958?

Title 36, Section 68, supra, provides in part the following:

> "The director of public safety is authorized to suspend or revoke the license of any resident of this state or the privilege of a non-resident to drive a motor vehicle in this state upon receiving notice of the conviction of such person in another state of any offense therein which, if committed in this state, would be grounds for the suspension or revocation of the license of a driver.
>
> * * * * * * *
>
> "For the purposes of this article the term 'conviction' shall mean a final conviction."

It can be readily seen that the crucial question herein presented is the construction of the word "conviction" as it pertains to the proceedings had in Georgia on the driving while intoxicated charge.

In the case of **State ex rel. Woods v. Thrower,** 272 Ala. 344, 131 So. 2d 420, the Supreme Court of Alabama held that the plea of nolo contendere is an adjudication on a declaration by the defendant in open court that he prefers not only to stand mute with respect to answering the charge, but also will not contest the prosecution's efforts with respect to it; the plea is in the nature of a compromise between the prosecution and the defendant, and is not a plea of guilty but is in the nature of a tacit confession; it is limited to the particular case in which it is entered and has no effect outside of that case. See also **Fidelity-Phenix Fire Ins. Co. of New York v. Murphy,** 231 Ala. 680, 166 So. 604; **Wright v. State,** 38 Ala. App. 64, 79 So. 2d 66, certiorari denied 262 Ala. 420, 79 So. 2d 74.

Based upon the above determination as to the nature of the plea of nolo contendere, the Supreme Court held in the **Thrower** case, supra, that the defendant's conviction, upon a plea of nolo contendere, to evasion of United States income taxes did not render him ineligible to serve as city commissioner under constitutional and related statutory provisions rendering ineligible for public office any person "convicted" of an infamous crime or "convicted of a crime punishable by imprisonment in the state or federal penitentiary.

Similarly, in the case of **May v. Lingo,** 277 Ala. 92, 167 So. 2d 267, the Supreme Court of Alabama, citing as authority the **Thrower** case, held that an Alabama driving while intoxicated conviction was not valid when founded on a plea of nolo contendere, and that such a conviction could not serve as a basis for the revocation of an Alabama driver's license under Title 36, Section 68, supra.

It is the view of this office that the nature of the plea, whether it be one of "guilty," "not guilty," or "nolo contendere," should be immaterial in determining whether there has been a "conviction" within the contemplation of Title 36, Section 68, supra, or any other statutory or constitutional provision. Nevertheless, we are bound, as you are well aware, by the decisions of our Supreme Court, and that Court has ruled to the contrary in the cases cited above, which are here controlling.

Accordingly, it is my opinion that the Department of Public Safety is not authorized, under the provisions of Title 36, Section 68, supra, to suspend or revoke the driver's license of an Alabama resident who has entered a plea of nolo contendere to a driving while intoxicated charge in Georgia.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

June 22, 1971

Honorable L. B. Sullivan
Commissioner
Board of Corrections
State of Alabama
101 South Union Street
Montgomery, Alabama 36104

State and State Departments—Board of Corrections —Prisons and Prisoners

Term "immediate family" discussed.

Opinion by Assistant Attorney General Henry.

Dear Mr. Sullivan:

I have your request for an opinion of this office as to the construction given the term "immediate family" as such is used in Title 42, Section 8, Code of Alabama 1940, Recompiled 1958. This Section provides, among other things, for temporary leave for a prisoner in the event of serious illness or death of a member of the prisoner's immediate family.

The term "immediate family" has been construed in other jurisdictions as being members of the same household who are bound together by ties or relationships. **Cincinnati N. & C. Ry. Co. vs. Peluso, Ky.,** 293 S. W. 2d 556.

The Supreme Court of Alabama has held that the word "family" is "flexible in its meaning, depending for its definition largely on the different circumstances under which it is used." **Gamble v. Leva,** 212 Ala. 155, 102 So. 120, **Southern Guaranty Insurance Company v. Gipson,** 275 Ala. 538, 156 So. 2d 630.

The granting of temporary leave under Title 42, Section 8, supra, would obviously be for the most compassionate and benevolent of purposes.

Often, occasions will arise where a prisoner will have been raised in the same household with an aunt, grandmother, cousin, in-law, etc. To deny temporary leave under Title 42, Section 8, supra, to a prisoner to visit or attend the funeral of such person would not comply with the intent of the law.

It is my opinion, therefore, that the term "immediate family", includes members of the same household with whom the inmate is bound, either by ties or relationship.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

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| Expenses—Travelers Checks | Colleen Pippin | April 27 | B. Pub. Inf. |
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| Secretary State—Contract | Mabel S. Amos | April 12 | Sec. State |
| Teacher—Retirement | E. L. Bottoms | June 15 | Teacher Ret. |
| Veterans—Eligibility | Walter C. Head, Jr. | April 12 | Veterans Aff. |
| Waste Disposal—Program | Dr. Ira L. Meyers | May 3 | Health Dept. |

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